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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 721

ISBRANDTSEN-MOLLER COMPANY, INC.,
Petitioner,

—against—

Motorship "TOLEDO" and WILH. WILHELMSEN,
et als., Owners,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JAMES W. RYAN,
Counsel for Petitioner.

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Motorship "TOLEDO" and WILH. WILHELMSEN, et als., Owners,

Respondents.

Petition for Writ of Certiorari.

Petitioner, Isbrandtsen-Moller Company, Inc., prays that a writ of certiorari issue to review a decree of the Circuit Court of Appeals for the Second Circuit entered August 16, 1941 (R., p. 488; pursuant to opinion announced in open Court on Monday, July 28, 1941, *The Toledo*, 122 Fed. 2d. 255), affirming a decree in Admiralty of the District Court for the Eastern District of New York (R., p. 454; *The Toledo*, 30 F. Supp. 93), dismissing a libel.

The libel's first cause of action is against respondent shipowners on a charter party for the carriage of a full cargo for petitioner, on a voyage from New York and Philadelphia to European ports, for breach of charter party by delivering an unseaworthy ship. The second cause of action is in tort by petitioner, as bailee of cargo

and assignee of cargo owners' rights, against respondent shipowners and the ship in rem for tendering an unseaworthy ship for loading.

The Circuit Court of Appeals held that the ship was unseaworthy, and that the respondents had breached the charter party, but that petitioner was not a common carrier but a "volunteer", or an agent of third party cargo owners with whom it had contracts, i. e., was a forwarder, and therefore that it could not recover from respondents the excess of the transshipment expense it incurred in forwarding the cargo on a seaworthy vessel over the expense it would have incurred if the unseaworthy ship had carried the cargo.

Jurisdiction.

Jurisdiction is provided by 28 U. S. C., Sec. 347 (a).

Summary and Short Statement of Matter Involved.

So far as careful search has disclosed, this is the first case (aside from *Isbrandtsen-Moller Company* v. *United States*, 300 U. S. 139, in which the point was decided but without discussion of principle involved), that has ever come before this Court involving the question whether the legal status of a charterer who charters the full space on a vessel from a private carrier shipowner and then undertakes himself to issue bills of lading to various American shippers, and act as a common carrier, is that of a common carrier (*i. e.*, an independent contractor) or that of a mere forwarder or broker who brings together the vehicle owner and the owners of the goods and who therefore, in case the vehicle owner supplies an unfit vehicle, cannot recover damages for the vehicle owner's breach of the single shipping contract entered into with

the charterer. If the charterer is not a common carrier then there has never been any person acting as a common carrier in the present case notwithstanding the actual relations of the charterer to the shippers were obviously those of a common carrier. Indeed this Court held in *Isbrandtsen-Moller Company* v. *United States*, 300 U. S. 139, that this petitioner is a common carrier. Yet the Circuit Court of Appeals, in conflict with that decision, has held in this case that the charterer (the petitioner) is not a common carrier but a forwarder or broker whom the cargo owners indemnify for any expenses, and who, when the vehicle owner supplies an unfit vehicle, can recover damages from the vehicle owner only as agent of the goods owners, or who becomes a "volunteer" if he himself incurs expense in transshipping the goods on a fit vehicle on the unfitness of the vehicle supplied being discovered. This Court recently held in *Acme Fast Freight* v. *United States*, 309 U. S. 638, and in *United States* v. *Trucking Co.*, 310 U. S. 344, that the companies there involved were not common carriers but forwarders because they booked the large lot of individual shipments as a single shipment with a *common* carrier, and had themselves always been regarded by the Government's regulatory commission (the Interstate Commission) as forwarders and not common carriers. The petitioner in the present case, on the contrary, shipped the full cargo as a single shipment with a *private* carrier, and has always been regarded by the United States Maritime Commission as a common carrier and not a forwarder. And, as already indicated, in a case involving an administrative interpretation by the Maritime Commission of this petitoner's legal status, this Court has already held that this petitioner is a common carrier. *Isbrandtsen-Moller Company* v. *United States*, 300 U. S. 139. And Congress at this very moment is considering legislation (Bill S. 210 to add

a new Section IV to the Interstate Commerce Act) to avoid this Court's decisions in the *Trucking Company* and *Acme Fast Freight* cases on the factual ground that the new type of forwarder there involved is a common carrier or independent contractor. In the Congressional Record, issue of October 23, 1941, page 8423, when the House Committee reported the legislation, the facts constituting the change in status of the companies there involved from forwarder to carrier, and the necessity of legislation for clarifying present-day actual legal relations in shipping contracts, were stated as follows (Congressional Record, issue of October 23, 1941, p. 8423):

> "The last decade has seen the growth of those forwarders which, in the pursuance of a public business for profit, issue bills of lading, take possession of shipments, assume responsibility for collection and delivery of the shipments as well as for loss and damage, issue freight bills, make a single charge for a complete service from origin to destination, and collect charges in their own behalf. Whether under their bills of lading or shipping receipts they undertake to transport or only to cause to be transported by others, such forwarders appear to incur the liability of a common carrier to the owner of the goods, although bearing the relation of shipper to the carrier performing the actual carriage of the goods. * * *
>
> The principal characteristic of the service of forwarders of the modern type is the expedited movement of freight which they obtain * * *."

The petitioner is a New York corporation, which has for many years been one of the principal common carriers of goods in liner service from New York, Philadelphia and Chester to European ports, operating as the Maersk Line on a regular schedule of publicly advertised fortnightly sailings. Like many other carriers operating

out of New York, it does not own most of the vessels it uses, but charters them from their owners for the carriage of a full cargo of any lawful merchandise for it on "a transatlantic voyage across" from New York and Philadelphia to European ports on an express written promise by the shipowners that the vessels will be thoroughly seaworthy in all respects at the time they are tendered or delivered to it at Philadelphia or New York for loading. The owners of the vessels employ and manage the officers and crews and remain in possession of the vessels at all times, and assume by contract with petitioner all obligations and expense in connection with seeing to it that the vessels are in fact seaworthy at the time they are tendered to petitioner for loading. The petitioner loads and discharges the cargoes of the vessels and supplies the fuel oil for the transatlantic voyage, and pays compensation or charter hire in advance on a time or calendar month basis directly to the shipowners in full settlement to them for all of the vessels' services, and the only contractual relations of the shipowners are with the petitioner. The petitioner, however, enters into contracts of its own with the public or numerous third party American shippers, and thus assembles on the docks at New York and Philadelphia the full cargo which the shipowner has agreed to carry for it. So far as the shipowner is concerned, the petitioner is the only shipper, and the only person with whom the shipowner has at any time any contractual relations or obligations. (The respondents admitted in their answer that the cargo was shipped by the libellant, the petitioner in this Court.) Neither the contracts between the petitioner and the third party shippers nor the bills of lading issued by petitioner to those third parties even mention the owner of the ship, nor does the charter-party or contract between petitioner and the shipowner give the shipowner any rights

or benefits under those bills of lading or contracts between petitioner and the third parties.

On the above-mentioned terms, on December 7, 1938, at New York, the respondent shipowners chartered their vessel, the "Toledo", to petitioner for the carriage of a full cargo for it on a "transatlantic voyage across" from North Atlantic ports (designated as New York, Philadelphia and Chester) to Europe, and expressly promised in writing that the vessel would be thoroughly seaworthy in all respects at the time of her delivery to petitioner at Philadelphia for loading. The petitioner, accordingly, advertised her for a sailing from New York on December 23, 1938 for European ports and assembled a full cargo for her on the docks at New York, Chester and Philadelphia, and on her delivery to petitioner at Philadelphia on December 15, 1938, loaded the small Philadelphia part of the cargo, and shortly afterwards at Chester loaded the small Chester part of the cargo, and issued its own bills of lading to the third parties owning those parts of the cargo, and then instructed the vessel to proceed to New York to complete loading the remainder or major part of the cargo there. On arrival of the vessel at New York, petitioner was informed by the master of the vessel, representing the respondent shipowners, that the vessel was so seriously unseaworthy that she could not be made seaworthy for at least thirty days (the renewals and repairs actually took almost two months), and both courts below have found as a fact that the vessel had been unseaworthy and unfit for the service ever since she was tendered or delivered to petitioner at Philadelphia on December 15, 1938 as being supposedly seaworthy and ready for the transatlantic voyage. It would take only about thirteen days after completion of loading cargo for the entire contract voyage to destination to be completed by a seaworthy vessel. The petitioner ac-

cordingly declined to continue loading cargo on a ship known to be so seriously unseaworthy, and personally incurred large out-of-pocket expenses because of the unseaworthiness in getting other vessels to carry the cargo to destination. It brought this suit in its individual capacity as charterer (the first cause of action in the libel) to recover those expenses from the defaulting shipowners in so far as they exceed the expense which petitioner would in ordinary course have incurred if the unseaworthy vessel had carried the cargo to destination. It added a second and independent cause of action in which it sued in its capacity as bailee of cargo and assignee of third parties' claims against the respondent shipowners for the independent damages sustained by them from the vessel's unseaworthiness, which existed at the time their goods were received for loading.

The Circuit Court of Appeals in the first half of its opinion "assumed" (122 Fed. (2d) 257), and therefore must be regarded as holding, as follows:

1. The respondents were required by the terms of the charter party to carry a full cargo for petitioner to Europe, and to deliver to the petitioner a seaworthy ship for that purpose.

2. In breach of the charter party they delivered an unseaworthy ship.

3. The petitioner had a legal right to reject her.

4. The petitioner did reject her.

5. The respondents thereupon became under a duty to immediately obtain and deliver to petitioner a seaworthy ship to get the cargo forward to destination.

6. Notwithstanding this was demanded, they failed to do so, and took the legally-untenable position that they were not required by the charter party to deliver a seaworthy ship.

7. The petitioner thereupon incurred expenses in performing the respondents' duty of getting the cargo forward to destination on a seaworthy ship, which were in excess of the expenses it would have incurred if the ship which petitioner delivered had been seaworthy and had carried the cargo.

8. The petitioner brought this suit (the first cause of action in the libel) to recover those expenses from respondents.

The Circuit Court of Appeals, instead of stopping its opinion and decision at that point, and awarding petitioner those damages, as it should have done, then proceeded to exonerate the respondents from liability for any damages whatever, and dismissed the libel, on the following two inconsistent theories:

First Theory of the Circuit Court of Appeals.

1. The petitioner, although legally entitled to reject the unseaworthy ship, was not required by independent contracts it had entered into with third persons to do so, and was therefore "*a volunteer*" in forwarding the cargo on a seaworthy ship, and is therefore not entitled to recover from the respondents the expense it incurred as a result of the latter's breach of charter party with it.

Second and Inconsistent Theory of the Circuit Court of Appeals.

2. The petitioner in incurring the transshipment expense was not a volunteer but *an agent of third party cargo owners*, because as to the two small parts of the cargo loaded on the unseaworthy ship at Philadelphia and Chester before her arrival at New York, the petitioner had entered into independent contracts with various third persons, owners of the goods included in the cargo which petitioner was shipping, consisting of so-called charterer's bills of lading, in which it reserved, as between it and the third persons, the privilege of transshipment at their expense, and promised only to supply them a ship which would be seaworthy in so far as exercise of due diligence would make her so, and such due diligence had in fact been exercised although the ship was unseaworthy. And on December 31, 1938, after the unseaworthiness had been discovered and all of the cargo had been transshipped by petitioner on a seaworthy vessel "between December 27th and December 31st", the petitioner had written letters to the third party cargo owners stating that it would waive all of its claims against them for reimbursement of transshipment expense or otherwise, excepting the original agreed freight payable to it for carriage on the unseaworthy ship, if they would sign the enclosed usual admiralty form of assignment to petitioner of their claims against respondents for having tendered an unseaworthy ship for loading, so that those claims could be included in a second cause of action. The assignments contained the usual recital that the transshipment expense would be, as between charterer and cargo owners, for cargo owners' account, which is necessarily inserted for the purpose of negativing any admission by the charterer that it will itself be liable to the cargo owners in case in the litigation

between charterer and shipowners the shipowners are held by the Courts to be under no duty to deliver a seaworthy ship.

Although there was no clause in the charter party or in the charterer's bills of lading giving the shipowners the benefit of those independent contracts between petitioner and the third party cargo owners, the Circuit Court of Appeals held that the respondent shipowners were nevertheless entitled to the benefit of them so as to escape liability to petitioner for having breached the charter party by delivering an unseaworthy ship, and were legally justified in taking the position that the cargo owners, had thus, evidently as insurers, by the above-mentioned "letters and assignments", or contracts with petitioner, assumed all liability of respondents to petitioner to reimburse the latter for expense incurred in getting the cargo forward to destination on a seaworthy ship, and that the petitioner in incurring the expense was therefore not "a volunteer" but *an agent of the third party cargo owners*. This was obviously a holding, in substance, that the respondents were entitled to the benefit of insurance contracts which the petitioner had effected with third parties, and were thus entitled to escape paying the damages for which respondents were concededly liable to petitioner. The Circuit Court of Appeals then proceeded to hold, further inconsistently, that the third party cargo owners could not recover those expenses incurred by petitioner, supposedly on their behalf, from respondents because the respondents had no contract with the third party cargo owners and did not owe them the contractual duty it owed to petitioner, the respondents' only contract being the charter party entered into with petitioner.

The Circuit Court of Appeals by its decision in this case has announced a new rule that when a partly-loaded

ship is found to be so unseaworthy that the transshipment of the cargo at the shipowners' expense on another ship is legally required by the shipowners' contract with the charterer, the shipowners can nevertheless escape liability by simply failing to transship, and the law renders the charterer powerless to transship because if it does so it is a "volunteer" (122 Fed. 2d. at p. 257) and cannot recover from the owners of the unseaworthy ship the excess of the charterer's transshipment expense over the expense it would have incurred during the voyage if the original ship had been seaworthy and had carried the cargo. This part of the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *The Caledonia*, 157 U. S. 124, *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199, and deprives the rules there announced by this Court of any practical usefulness. The Circuit Court of Appeals holds that notwithstanding the ship was so unseaworthy that the charterer was legally justified in rejecting her under the rule laid down in *The Caledonia*, 157 U. S. 124, because she was not in accordance with the express charter party requirement that she be seaworthy, nevertheless the transshipment expense to destination on a seaworthy ship thus necessitated must be borne by the wholly-innocent charterer as "a volunteer". The Court ignores the elementary rule that the victim in doing what the defaulting wrongdoers should have done in getting the cargo forward to destination on a seaworthy ship, is acting as agent of the wrongdoers and for their account in incurring the transshipment expense in excess of the charterer's normal voyage expense.

The Court then inconsistently goes on to hold that in incurring the transshipment expense the charterer was not acting as a volunteer, but as agent of the third party cargo owners who had entered into contracts only with

it, and on this new basis concludes that the transshipment expense paid by the charterer must be borne by those innocent third parties, and cannot be recovered through the charterer's suit on their behalf in the libel's second cause of action, or on the charterer's own behalf in the first cause of action, because of clauses in those contracts giving the charterer the privilege of transshipment at the cargo owners' expense, or because of a recital in the written assignments to the charterer of the cargo owners' claims against the shipowners that the transshipment expense is for cargo owners' account. But in construing those assignments as matter of law the Court was obviously in error because the charterer's letters annexed to the assignments and transmitting them for signature state specifically that the charterer relieves the cargo owners from liability to pay any part of the transshipment expense to the charterer in consideration of their assigning their claims against the shipowners to it. The cargo owners, therefore, never assumed any liability to pay those expenses, and have never in fact paid them.

The Circuit Court of Appeals decided that the action of the charterers after the unseaworthiness was discovered, in obtaining the privilege of transshipment at the third party cargo owners' expense so as not to admit any liability of the charterer to them in case the shipowners should be exonerated by the courts from liability for delivering an unseaworthy ship, constituted an insurance or indemnity contract of the cargo owners in favor of both the charterer and the guilty shipowners, or an assumption by the cargo owners of the shipowners' liability to the charterer for breach of charter party, so as to preclude the latter from recovering from the shipowners the transshipment expense in excess of the charterer's ordinary expense on such a voyage. This part of

the decision of the Circuit Court of Appeals is in conflict with this Court's decisions in *The City of Norwich*, 118 U. S. 468, and *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312.

By the decision of the Circuit Court of Appeals, the consequences of the shipowners' breach of contract with the charterer are thrust on the innocent cargo owners or on the equally-innocent charterer. It is the charterer who sustains those consequences in this case because it has incurred and paid the entire expense of forwarding the cargo on other vessels, and it has received from the cargo owners only the ordinary freights due from them to it under the original arrangements for the carriage of the cargo on the vessel which turned out to be unseaworthy. This leaves the charterer out of pocket the excess expenditure necessary to forward the cargo on other vessels, and the present suit has been brought against the shipowners to recover that expense.

Under the two above-mentioned rules of law announced by the Circuit Court of Appeals in this case, the movement of goods to destination is interfered with by new rules of law instead of expedited, and the rules announced long ago by this Court are upset notwithstanding they were designed to expedite the flow of commerce, and are necessary to prevent a cluttering of the docks in our sea ports with cargoes which ought to go forward on other vessels but which the charterers cannot send forward as the economic and legal necessity dictates without, as the Circuit Court of Appeals holds, acting as "a volunteer" or as agent of non-liable third parties, and thus abandoning all legal rights to reimbursement from the shipowners who delivered the unseaworthy ship.

The letters refered to by the Circuit Court of Appeals in its opinion were letters of the petitioner transmitting the mimeographed forms of assignment to the cargo

owners for signature, and are all in the same form, and read in full as follows (Exhibit 42; R., p. 330):

"December 31, 1938

To all Shippers and Owners of Cargo
on board the Motorship 'Toledo'
being transshipped on the Steam-
ship:

Dear Sirs:

While the Motorship 'Toledo' was completing loading her cargo in the port of New York, she was found to have a fracture in her main crankshaft web, which would necessarily delay her sailing until late in January. Under these circumstances we are arranging to transship your cargo on the s/s 'Otto Petersen', which sailed from the port yesterday. We are putting forward a claim against certain third persons whom we believe to be responsible for this trouble. We are very anxious to spare the shippers and consignees of the cargo any annoyance or expense, but in order to prosecute the claim successfully, we must be in a position to proceed not only in our own right, but in the right of the shippers and consignees of the cargo. Accordingly, we request that you send us a letter in the form enclosed, which ratifies our action in transshipping the cargo as your representative, and assigns to us any claims and demands which you may have against the m/s 'Toledo' and/or her owners in consideration of our agreement that the cargo will be delivered to the consignees without any claim for additional freight or for any additional expense whatsoever.

Very truly yours,

ISBRANDTSEN-MOLLER COMPANY, INC.

Enc."

(The letters and the form of assignment to be signed by the cargo owners were sent out by petitioner to the cargo owners on December 31, 1938, and the Circuit Court of Appeals has found that petitioner had already "between December 27th and 31st, discharged the cargo and sent it forward on other vessels." 122 F. 2d at p. 256.)

The assignments referred to by the Circuit Court of Appeals in its opinion, and referred to in the above-quoted letter, are also all in the same form and read in full as follows (Exhibit 41; R., pp. 329-331):

"December 31, 1938

Isbrandtsen-Moller Company, Inc.,
26 Broadway,
New York, N. Y.

Dear Sirs:

In consideration of your discharging our cargo from the Motorship 'Toledo' into the Steamship 'Otto Petersen' and getting it forward promptly to destination on the latter vessel, we confirm that the expense in this connection was incurred by you for our account, and that in consideration of your delivering the cargo at destination without payment of additional freight or reimbursement for this expense, we hereby assign, transfer and set over to you any and all claims, demands and causes of action which we have or may have (either for our own account or in a representative capacity) against any vessel, person or corporation who may be legally responsible for the 'Toledo's' inability or failure to perform the voyage for which she received the cargo.

Very truly yours,

Description of cargo:"

The Circuit Court of Appeals, in interpreting the above-quoted letters and assignments as a waiver by petitioner of its right to recover its own expenses or damages from the defaulting shipowners for breach of charter party, held that the petitioner should recover its expenses resulting from respondents' breach of contract, not from the defaulting respondents but from the innocent cargo owners who are not parties to the suit and who assumedly had agreed independently with petitioner to bear the burden of any damages resulting from respondents' breach and had thus assumed responsibility as an insurer of both respondents and petitioner against all damages resulting from respondents' breach of contract in delivering to petitioner an unseaworthy ship. This part of the Circuit Court of Appeals' decision is plainly in conflict with this Court's decisions in *The City of Norwich*, 118 U. S. 468, and in *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312. The result of the Circuit Court of Appeals' decision is that no one will reimburse, or has reimbursed, petitioner its expenses resulting from respondents' delivery to it of an unseaworthy ship, because obviously under the letters and assignments, the innocent cargo owners are not liable to petitioner for the damages caused to it by the respondents' legal fault in delivering an unseaworthy ship to petitioner for the carriage of the goods. Moreover, it is immaterial on the first cause of action in this suit whether or not the cargo owners, under their independent contracts with petitioner not involved here, were also liable to reimburse petitioner as insurer or otherwise for the expenses of forwarding the cargo on another vessel. The question here is simply whether or not the respondents are liable to petitioner for its expenses incurred as a direct result of having received an unseaworthy ship from respondents in breach of the charter party.

The essential part of the opinion of the Circuit Court of Appeals summarizing the matter involved is as follows:

"The vessel was delivered to the charterer at Philadelphia on December 15, 1938" (122 F. 2d at p. 256).

After the charterer had loaded part of the cargo for the contemplated transatlantic voyage to Europe "a fracture of the No. 3 crankshaft web was discovered. The charterer was immediately notified thereof and stopped the loading of cargo. The following day (December 22, 1938) it was informed that repairs would take thirty days" (122 F. 2d at p. 256).

The charterer "between December 27th and 31st, discharged the cargo and sent it forward on other vessels. By its libel, filed on January 21, 1939, the charterer sought recovery in two capacities: (1) as time charterer, for breach of contract, and (2) as bailee and assignee of cargo for damages sustained by owners of cargo" (122 F. 2d at p. 256).

"Its main claim of damages was for the cost to it of discharging and transshipping cargo" (122 F. 2d at p. 257).

"The charter party contains a recital that hull, machinery and equipment are 'in a thoroughly efficient state', and a promise that on delivery the vessel shall be 'tight, staunch, strong and in every way fitted for the service'. * * * The district judge ruled that under the charter party there was a warranty that the vessel was seaworthy when the charter was made on December 7, 1938 and when she was delivered on December 15th. He found from the evidence that she was not seaworthy at these times. Neither party questions these findings. The cause of her unseaworthiness was defective metal in the No. 3 crankshaft web" (122 F. 2d at p. 256).

Because of an "accident" exception clause, the District Court "* * * ruled that the ship and its owners

were relieved from liability despite the ship's unseaworthiness at the date of making the charter party and the date of delivery of the vessel to the charterer.

The appellant contends that this ruling is contrary to the construction which the Supreme Court has placed on similar exception clauses. *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655. The appellees attempt to distinguish those cases on the ground taken by the district judge, namely, that there the warranty of seaworthiness was made by a common carrier while here it is the promise of a private carrier. It may well be doubted whether that distinction is significant when the question is the construction of a contract to determine whether the warranty of seaworthiness is modified by an exception of accidents to machinery which result from preexisting unseaworthiness. The obligation to furnish a seaworthy ship is the same in each case. See *The Edwin I. Morrison*, 153 U. S. 199; *The Addison E. Bullard*, 2 Cir., 287 F. 674. * * * The principles of construction discussed in *The Caledonia*, *supra*, would seem to be equally applicable when the warrantor is a private carrier" (122 F. 2d at pp. 254-255).

If the Circuit Court of Appeals had stopped its opinion at that point (at line 12 on page 257 of 122 F. 2d), it is obvious that it would have reversed the District Court's decision in this case on the ground that it was in conflict with this Court's decisions in the cases of *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199, and would accordingly have approved petitioner's refusal to use, or to continue loading cargo on, a ship known to be seriously unseaworthy, and would have awarded to petitioner the actual damages which it personally incurred as a result of the unseaworthiness of the vessel, and for which it has not been reimbursed by anyone, consisting of the ex-

pense or "the cost to it of discharging and transshipping cargo" to destination on other vessels (122 F. 2d at p. 257), over and beyond the expense petitioner would in ordinary course have incurred in connection with the voyage if the unseaworthy vessel had been seaworthy and had carried the cargo to destination. We earnestly submit that the Circuit Court of Appeals should have stopped its opinion at that point in so far as the first cause of action in the libel is concerned, and that the remainder of its opinion with respect to the first cause of action is entirely incorrect and, indeed, irrelevant because it is based on two mistaken assumptions which the Circuit Court of Appeals then proceeds to make in its opinion when referring to the first cause of action in the libel, and which are themselves based on the further incorrect assumption of law that petitioner was not a common carrier but a mere forwarder. The first assumption it makes is as follows:

> "The theory of the charterer on this claim is that in transshipping the cargo it was mitigating the damages which the cargo owner would have against it; thereby reducing the claim it would have in indemnity against the respondent" (122 F. 2d at p. 257).

That is a wholly-incorrect assumption. No such theory was ever advanced by the charterer in the first cause of action or in any of its pleadings, briefs, or oral argument in either court below, nor was any such theory or contention ever advanced in either court below by respondents. The theory of the charterer, the petitioner, at all times, and by specific allegation in Articles 18 and 19 of the first cause of action in the libel, has been that in forwarding the cargo on other vessels it was mitigating the damages for which the defaulting respondents (not the innocent cargo owners) were liable to it; thereby reducing the claim petitioner had against *the respondents*.

The second assumption of law which the Circuit Court of Appeals then proceeds to make in its opinion is that "the letters and assignments obtained from the cargo owners expressly recognize that the expense of transshipment was for the cargo owner's account" (122 F. 2d at p. 257). That assumption is correct only in case the respondent shipowners should not be liable for breach of their obligation under the doctrine of the *Caledonia* case to deliver to petitioner a seaworthy ship. If the respondents were so liable, then, under the letters and assignments, the transshipment was obviously for the defaulting respondents' account in mitigation of petitioner's damages resulting from the respondents' breach of the charter party.

Furthermore, the Circuit Court of Appeals made in substance the same mistake as the District Court and reached the same result of violating the *Caledonia* doctrine by going on to hold finally that no damages were recoverable by petitioner for the respondents' breach of the obligation to deliver a seaworthy ship, notwithstanding the clear violation by respondents of this Court's rule as announced in the *Caledonia* case. In practical effect there is no difference between the District Court's rejection of the *Caledonia* rule and the Circuit Court of Appeals' recognition of the applicability of the rule but refusal to award petitioner its expenses or damages resulting from respondents' violation of the rule. It is important to note that the Circuit Court of Appeals failed to award petitioner the expenses it incurred from the unseaworthiness, not because no damages had been actually sustained by petitioner, but because the expenses which petitioner personally incurred as a result of the unseaworthiness in getting the cargo forward to destination on other vessels, and for which it has never been reimbursed by any one, were supposedly incurred by it as agent of the innocent third parties who owned the cargo and not as agent of the

defaulting respondent shipowners whose delivery to petitioner of an unseaworthy ship in violation of their obligation under the doctrine of the *Caledonia* case had caused the necessity for the forwarding of the cargo on other vessels. The Circuit Court of Appeals evidently overlooked the fact that under the letters and assignments obtained by petitioner from the cargo owners the expense of transshipment would be for the cargo owner's account only in case the respondent shipowners should not be liable to petitioner and the cargo owners for breach of the doctrine of the *Caledonia* case by delivering to petitioner an unseaworthy ship. In the letters and assignments the cargo owners, in the ordinary way that is always done in these admiralty cases, transferred their claims to petitioner who sued on them in the second cause of action. But that obviously did not mean, as the Circuit Court of Appeals erroneously holds, that the cargo owners were waiving their or petitioner's rights against the defaulting shipowners, or were assuming the shipowners' liability for having delivered the unseaworthy ship, or were insuring the respondent shipowners against their liability to petitioner for delivering an unseaworthy ship. The language of the letters and assignments is perfectly plain that all rights of petitioner and the cargo owners against the respondent shipowners for delivering an unseaworthy ship to petitioner and the cargo owners are preserved and are to be enforcible by petitioner directly against respondents. Assuming, as the Circuit Court of Appeals did, the respondent shipowners were liable for breach of the *Caledonia* doctrine by delivering to petitioner an unseaworthy ship, then it necessarily follows as matter of elementary law that in exercising its duty to mitigate the damages by forwarding the cargo to destination on other vessels on as economical terms as possible the petitioner was acting as agent of the defaulting respondent shipowners and not as agent of the wholly-innocent cargo owners who owed

no obligation to insure the shipowners against the damages caused to petitioner by the shipowners' default. And this is alleged, strictly in accordance with long-established admiralty practice in such cases, in precise language in Articles 18 and 19 of the first cause of action in the libel. The decision of the Circuit Court of Appeals in this case is in effect a holding that the innocent cargo owners were insurers of the respondents' liability to petitioner for breach of charter party, and are liable for the damages caused to petitioner by the respondent shipowners in delivering an unseaworthy ship. The unsoundness of the decision is evident from the fact that the first cause of action in the libel is a suit by the petitioner, as charterer, against the respondent shipowners for breach of the charter party obligation to petitioner, and the respondents have never set up any defense in their answer that they are relieved of liability for petitioner's damages because the cargo owners had supposedly insured them or petitioner against the results of respondents' default under the charter party. And in their answer to that cause of action the respondents expressly admitted that the cargo was shipped only by petitioner, and the respondents repeatedly took the position in the courts below that no recovery could under any circumstances be had under the first cause of action, by way of indemnity to petitioner or otherwise, for any damages sustained or expenses incurred by third parties with whom petitioner had contracted but with whom respondents had not contracted, and the District Court expressly recognized and held at the trial that that position was sound and that the damages and expenses recoverable under the first cause of action were only those which petitioner had itself sustained or incurred. Yet the Circuit Court of Appeals assumes the exact opposite and mistakenly bases its decision on the assumption that under the first cause of action the peti-

tioner cannot recover the damages or expenses it itself sustained or incurred but only those which third parties sustained and for which petitioner is supposedly asking indemnity.

The first cause of action is stated in Articles 1 to 23 of the libel. Articles 18 and 19 of the libel read as follows (R., pp. 20-21):

> "Eighteenth: Because of the aforesaid breaches by respondent of its promises to libellant in said charter party of the Motorship 'Toledo', the libellant, in the exercise of ordinary care on respondent's behalf and on behalf of and at the demand of the cargo owners, in order to mitigate the damages for which respondent was liable, was compelled to discharge the part cargo already loaded on the 'Toledo' and to send forward or transship it and the remaining unloaded cargo to destination by carrying part of it on another vessel, the Motorship 'Tonsbergfjord', operated in libellant's regular liner service, and by delivering the remainder of said cargo to another reputable shipowner for carriage pursuant to the same aforesaid form of charter party on another vessel, the Danish Steamship 'Otto Petersen', on the voyage to London, Rotterdam and Antwerp which respondent had contracted as aforesaid with libellant to perform but had wholly failed to perform by supplying a vessel, the 'Toledo', which at the time she was tendered for service was seriously unseaworthy and unfit for a transatlantic voyage. The libellant, because of said breaches of charter party by respondent, was compelled in effecting said transshipment, to assume and incur, on respondent's behalf and for respondent's account, additional risks, hazards and liabilities, and to incur and expend numerous additional expenses, freights, and damages beyond those that would have been incurred or expended by libellant

if the respondent had properly performed the said charter party of the Motorship 'Toledo'.

Nineteenth: By reason of the premises, the libellant has sustained damages amounting, as nearly as the same can now be ascertained or estimated, to the sum of One Hundred Thousand ($100,000.00) Dollars, no part of which has been paid by respondent, although duly demanded, and payment has been refused by respondent."

The District Court, referring at the beginning of the trial to the pleadings, said (R., pp. 191-192):

"The Court: I think if you recovered anything it would be any expense you have been put to. I think you can recover more than that. I think as bailee you can recover anything the cargo owner could recover, * * *.

The Court: You have two causes of action.

Mr. Ryan: * * * The whole thing that is important is the charter party * * *. In other words, whatever we recover are our damages or expenses, which does not have to be turned over to the shippers.

The Court: As to that I agree with you. I think we will go along with it as it is. I may be wrong. This is my opinion, that as charterer your right of recovery is based on the contract they (the respondents) made with you.

Mr. Ryan: That is right.

The Court: As bailee of the cargo your right to recovery is the right the cargo owner would have had, *what you paid out. You did not pay out as bailee of cargo, you paid that out as charterer.* * * *

The Court: That is my opinion. * * *

Mr. Griffin: I do not understand Your Honor is making a final ruling on the first cause of action?

The Court: No. That is my opinion generally on the right to plead the *fourth* (first) cause" (R., p. 192).

(The italicized portion of the above quotation has obviously been incorrectly punctuated by the Court Reporter and should read: "What you paid out you did not pay out as bailee of cargo. You paid that out as charterer." And the words "fourth cause" should obviously be "first cause" because there are only two causes of action in the libel, and the subject asked about in the question being answered was "the first cause of action").

The Questions Presented.

Three fundamental questions are presented:

The first question presented is whether petitioner is a common carrier, or is a mere volunteer or a forwarder or agent of third party cargo owners who brings together the private carrier shipowner and the third party owners of the various lots of goods making up petitioner's cargo, and then drops out of the picture without ever having been a common carrier and with no right to sue, or liability to be sued by, the shipowners or the cargo owners with respect to the obviously unseaworthy vessel which the respondent shipowners tendered for loading under the charter party.

The second question presented is whether or not the respondents, who, according to the Circuit Court of Appeals, have breached their contract with petitioner by delivering to it an unseaworthy ship, are exempted by law or legal fiction from paying to petitioner the expenses or damages it has incurred therefrom by performing respondents' duty of promptly obtaining a seaworthy ship and carrying the cargo to destination, on the theory that the issuance by petitioner of its bills of lading or cargo receipts to third parties, or the signing by the wholly-innocent third party cargo owners of assignments to petitioner of their own additional claims against respondents, and their statement in the assignments that, as between them and petitioner, the trans-

shipment expense is for their account (although they never pay it), make the third party cargo owners nevertheless insurers of respondents or of petitioner so as to relieve the respondents from having to pay any damages resulting to petitioner from respondents' conceded legal fault. The exact opposite of the Circuit Court of Appeals' decision on this point was decided by this Court in *The City of Norwich*, 118 U. S. 468, and in *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312.)

The third question presented is whether or not the petitioner was required to accept and use, and continue loading cargo on, a ship which was known to be so unseaworthy that she could not possibly be repaired or be fit to sail for almost two months. Both courts below have held in effect that petitioner was required to do so, although they differ in their reasons. The District Court held that petitioner was required to use the unseaworthy ship and continue loading on her because the respondents had not promised to deliver a seaworthy ship. The Circuit Court of Appeals held that the District Court's decision was erroneous on this point as matter of law because it was in conflict with this Court's decision on similar facts in the cases of *The Caledonia*, 157 U. S. 124, *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199. The Circuit Court of Appeals itself actually reached the same result, however, by then proceeding to hold in substance that the petitioner must accept and use, and continue to load cargo on, the unseaworthy ship because it will not be permitted to recover any part of the expenses it personally incurs in getting the cargo forward promptly to destination on other vessels. This conclusion of the Circuit Court of Appeals is based on the incorrect assumption that the petitioner cannot, under the rule announced by this Court in the *Caledonia* case, recover from the respondents any ex-

penses it personally incurs, but only expenses which third parties may incur and claim against petitioner. This holding is further based on the wholly erroneous assumption by the Circuit Court of Appeals that petitioner in its first cause of action in the libel is suing, not for its own expenses incurred as a result of the unseaworthiness, but for an indemnity for claims against petitioner by third parties under contracts to which respondents were not parties and which were not entered into until after respondents' breach had occurred, and which were not entered into for respondents' benefit, and which petitioner would assumedly (by the Circuit Court of Appeals) not breach by continuing the loading of cargo on the unseaworthy vessel. It is obvious from an examination of the libel that the first cause of action makes no claim or prayer for such indemnity against claims of third parties, and actually prays only for petitioner's own damages as charterer, consisting of the extra expense petitioner as sole shipper and charterer was put to personally in getting the cargo forward to destination promptly on other ships after the respondents had breached their express promise to petitioner that the ship tendered by them would be seaworthy at the time of delivery. The decisions of both Courts below are therefore flatly in conflict with the decision of this Court in the *Caledonia* case that under a contract like this a shipowner is required to deliver a ship which is seaworthy at the time of loading and sailing, and is liable to the charterer for the charterer's own damages and expenses sustained as a result of the delivery of an unseaworthy vessel.

The Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals in this case is on a matter of great present-day commercial importance in view of its announcing a new rule that

American shippers who ship their goods with a charterer who has publicly put a vessel on the berth for the general carriage of goods after having chartered her from a private carrier shipowner who remains in possession through his crew, have no legal relations as shipper and common carrier with either charterer or shipowner, because they have no contract with the shipowner either as common carrier or private carrier and because, according to the Circuit Court of Appeals, the charterer is not a common carrier or independent contractor but an agent of the various shippers, *i. e.*, a forwarder, or is "a volunteer", in getting the cargo forward to destination on a seaworthy ship when the shipowner breaches his contract with the charterer by tendering an unseaworthy ship for loading. The practical effect of the new rule is that neither the shipowner nor the charterer has any contractual duty to transship the cargo after an unseaworthy ship has been tendered for loading in a case, such as the present, in which the charterer does not by contract make to the shippers the promise that the shipowner made to the charterer that a seaworthy ship will be tendered for loading. The new rule makes of no practical or legal effect the shipowner's express promise to the charterer to tender a seaworthy ship, and leaves the charterer and the shippers with no recourse but to continue loading their goods on a ship known to be seriously unseaworthy, or else pay double freight by transshipping the goods on a seaworthy ship at their own expense. A more detrimental rule of law in its effect on American commerce and in its tendency to create cargo congestion on docks and on unseaworthy ships in American ports could hardly have been invented.

2. The decision of the Circuit Court of Appeals in this case is in conflict with the decisions of this Court in:

(a) *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, in which this Court held that this petitioner is a common carrier subject to regulation by the Maritime Commission under the common carrier sections of the Merchant Marine Act, 1936, and not a mere agent of cargo owners;

(b) *Acme Fast Freight* v. *United States*, 309 U. S. 638, and *United States* v. *Trucking Co.*, 310 U. S. 344, in which this Court held that a company carrying on business like this petitioner is not a forwarder or agent of cargo owners but a common carrier when it ships as a single shipper on a private carrier (not a common carrier), and is recognized by administrative interpretation by the Government's Regulatory Commissions as a common carrier;

(c) *The Caledonia*, 157 U. S. 124; *The Carib Prince*, 170 U. S. 655, and *The Edwin I. Morrison*, 153 U. S. 199; and

(d) *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312, and *The City of Norwich*, 118 U. S. 468.

Respectfully submitted,

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By JAMES W. RYAN,
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Of Counsel.

(13)

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 721.

ISBRANDTSEN–MOLLER COMPANY, INC.,
Petitioner,

against

Motorship TOLEDO, WILH. WILHELMSEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 721.

ISBRANDTSEN-MOLLER COMPANY, INC.,
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against

Motorship TOLEDO, WILH. WILHELMSEN, et al.,
Respondents.

BRIEF FOR RESPONDENTS

The respondents oppose the issuance of a writ of certiorari herein because (1) the decision of the court below was correct; (2) no important question of law is presented; (3) the questions discussed in the petition, for the most part at least, do not arise in the case at all.

The District Court's findings of fact, which are accepted by both parties, are at pages 444-449 of the Record.

The Facts

A considerable further statement of facts is necessary.

The vessel was time chartered by her owners, the respondents, to the petitioner. The time charter appears opposite page 24 of the Record. Paragraph 15 provides:

> "That in the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the

purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost * * *."

Paragraph 16 provides:

"* * * The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter party, always mutually excepted."

The vessel was delivered under the time charter at Philadelphia. She loaded a part cargo there and some additional cargo at Chester, Pa., and then proceeded to New York, where she was to take the remainder of her cargo, all of which was for delivery in foreign ports. On the way to New York, a sound was heard from the engines which, upon examination after arrival at New York, proved to have been due to the breakage of a crankshaft web (Finding 7, pp. 445, 446). Examination showed a latent defect in the web, consisting of defective metal within the casting. This had existed ever since the ship's construction, some twelve years before, although no trouble had ever been experienced in the past. It was found by the District Court that the ship and engines had been constructed by competent builders, under the supervision of Lloyd's; that proper inspections had been made; that the defect was not ascertainable from without; and that the owners and the ship's crew throughout had exercised due diligence (District Court Opinion, pp. 434-436; Findings 9-15, pp. 446, 447). These were all questions of fact in the District Court, whose findings were in favor of the respondents and these findings were not challenged on appeal. The case is, therefore, one of accident due to undiscoverable latent defect.

The ship had to repair before she could make the voyage. The normal procedure would have been for the ship, when repaired, to carry the cargo, none of which was perishable.

This was evidently the intention of the petitioner in the beginning, for it wrote a letter, Exhibit F, stating:

> "this vessel is automatically off time charter, due to accident to machinery from such time as this accident occurred until such time as vessel is repaired and put in suitable condition."

Subsequently, because of pressure from its shippers (O'Neill, pp. 282-285; Exhibits G and H) and in order to please the shippers for reasons of business policy, the petitioner decided to discharge the cargo already loaded and to send it, together with the New York cargo not yet loaded, forward by other means and, accordingly, it did so.

The bills of lading issued for the cargo loaded at Philadelphia and at Chester (Exhibits B1-3 and C), as required by law (U. S. Code, Title 46, § 1312), incorporated the U. S. Carriage of Goods by Sea Act, as follows:

> "This bill of lading shall have effect subject to the provisions of the 'Carriage of Goods by Sea Act' of the United States of America, and the carrier (which term shall be deemed to include the ship and the shipowner) shall be entitled to avail itself of all the rights and immunities and all other restrictions upon liability contained in said Act, and shall not be deemed to have surrendered any of its rights or immunities or restrictions upon liability or to have increased any of its responsibilities or liabilities."

Paragraph 1 of the bills of lading provided that the ship "as a part of the voyage" may, "with or without the goods on board and before or after sailing, or at any stage of the voyage * * * drydock, go on ways, or to repair yards." (On reverse side, just above signature):

> "Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the carrier, cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; and in the event of the cargo or a part of it being forwarded by vessels of the same

> Line, or otherwise, the cost of forwarding shall be payable by the Owners or Consignees of the goods and shall constitute a lien on the goods."

All of the fifty-eight bills of lading were in this form, except five, whose provisions were the same in substance.

The cargo on dock at New York was under dock receipts (Exhibits 1A-C), which provided:

> "The goods are accepted for shipment subject to provisions of the company's usual bill of lading as revised to date, and including liberty to substitute any other steamer, and this receipt to be exchanged for each bill of lading."

The dock receipts fixed no date for sailing; on the contrary, they gave "liberty to substitute any other steamer" and they showed on their face that this right had been exercised in a large proportion of the cases, for many of the dock receipts originally named earlier vessels and had been changed to name the *Toledo*. The bills of lading also gave similar liberty.

The bills of lading were concededly those "customarily used" (O'Neill, p. 240) and, as provided in the dock receipts, they were binding on the cargo from the time of its receipt by the petitioner, whether or not the goods were loaded or bills of lading actually issued (*Luckenbach SS. Co.* v. *American Mills Co.*, 24 F. [2d] 704; *Eastern Outfitting Co.* v. *Pacific Mail SS. Co.*, 26 Fed. [2d] 270).

It will be observed from the foregoing that (1) the bills of lading embodied the Carriage of Goods by Sea Act, as required by law; (2) they contained express provisions that, if there were a forced interruption of the voyage and the goods were forwarded, the cost should be payable by cargo.

The Carriage of Goods by Sea Act (U. S. Code, Title 46, Secs. 1300-1315) provides:

> "SEC. 4 (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from un-

seaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * * * *

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

As already stated, the findings below that due diligence had been exercised and that the accident happened without fault on the part of ship or owners, are not now questioned.

In connection with forwarding of the cargo, the petitioner wrote a letter (Exhibit 41) to each of the cargo shippers, in the form quoted at page 14 of the petition, requesting them to write a letter approving the petitioner's action "in transshipping the cargo *as your*" (i. e. cargo's) "*representative*," and assigning to the petitioner any claims which the cargo might have against the vessel or owners. Accordingly, the cargo interests sent to the petitioner the form of document requested (Exhibit 42, printed at p. 15 of the petition), which states that the forwarding expense "was incurred by you" (the petitioner)

"for our account" (i. e., for cargo's account), and assigns any claims which the cargo owners might have.

The petitioner brought suit (1) in its own right as charterer; (2) as assignee or "bailee" of the cargo. The second cause of action is stated (R., p. 22) to be "in tort."

I

The Opinion of the Circuit Court of Appeals.

A. *First cause of action.*

The Circuit Court of Appeals pointed out that both the letters and the assignments referred to above recognized that, under the bill of lading provisions, the expense of transshipment, if the goods were transshipped, was for cargo owners' account, and that the petitioner, in incurring it, was acting on their behalf. The Court further pointed out that, under the provisions of the bills of lading and of the Carriage of Goods by Sea Act, the petitioner was under no liability to cargo, if the voyage was delayed by the necessity of making repairs resulting from an accident which had not been caused by any lack of due diligence. Nor was there any special contract or agreement between the petitioner and the cargo interests which imposed any liability. As already stated, the normal course would have been for the cargo to be carried forward by the ship after repairs. If the petitioner chose, for the reasons of business policy already referred to, to send the cargo forward at once, it was entitled to do so, but not at the ship's expense, and the Circuit Court of Appeals so held.

B. *Second cause of action.*

In this cause of action, the petitioner sued "in tort" on behalf of and in the right of cargo, and by virtue of the assignments. The Circuit Court of Appeals quite cor-

rectly held that the petitioner had no other rights than those which cargo would have had; and since, under the bills of lading and the Carriage of Goods by Sea Act, the ship was not liable to cargo owners for an accident due to latent defect where due diligence had been exercised, therefore the petitioner, as charterer, had no greater rights. This is clearly a correct decision. Any claim of tort must be based on negligence and the undisputed findings negative any negligence.

It may be added that the owners of the cargo which had not yet been loaded on the ship obviously had no rights against either the ship or her owners, because there were no contractual relations between these cargo owners and the shipowners, the bills of lading for this cargo had not yet been issued, the cargo had not been loaded, and the shipowners had, as yet, no relation whatever to this cargo. Probably this is the reason why the second cause of action is stated to be "in tort". The respondents as shipowners owed no duty to this cargo nor were they guilty of any negligence. There was plainly no tort.

II

The Petition.

1. The petition states (p. 1) that the libel was dismissed by the Courts below. This is quite incorrect. The libelant received a decree for repayment of so much of the prepaid charter hire as had not been earned at the time of the breakdown (R., p. 455).

2. The petition states (p. 2 and elsewhere) that the Circuit Court of Appeals held that the petitioner was not a common carrier, but a mere forwarder. No such decision was made by the Circuit Court of Appeals and no such question is involved in the case. The petitioner did not argue this question in the Courts below, nor is it raised by

the pleadings or by the assignments of error. Moreover, it makes no difference whether the petitioner was a common carrier or not. The petitioner refers to *Isbrandtsen-Moller Co., Inc.* v. *United States,* 300 U. S. 139, where this Court denied an injunction to restrain enforcement of an order of the Secretary of Commerce requiring a steamship company to file a summary of its books and records for a specified period, showing commodities carried, rates of freight, etc. The opinion does not discuss the question of common carriage; and, of course, a company may be a common carrier in certain business relations and not in others. The case appears to have no bearing on that now before the Court.

3. The petition states, at pages 3 and 6, that the petitioner, as charterer, undertook to issue "its own" bills of lading, and, at pages 5 and 6, that the petitioner was the *only shipper* and the only person with whom the shipowner had any contractual relations; and further states, at least inferentially, at the bottom of page 5, that the bills of lading created no rights as between the cargo owners and the shipowner. These statements are wholly incorrect. The bills of lading name each individual shipper, specify the goods which he has shipped, and are issued, not by the petitioner on its own behalf, but

> "For and on behalf of the Master by
>
> ISBRANDTSEN-MOLLER COMPANY, INC.
>
> By ....., As Agents."

The very purpose of this form of signature was evidently to make it clear that the petitioner was not the carrier. Moreover, the time charter provides (par. 25) that it is not to be construed as a demise, "The Owners to remain responsible for the navigation of the Steamer, insurance, crew, and all other matters, same as when trading for their own account."

Furthermore, the bills of lading state that the term "carrier" shall include "the ship and the shipowner" (*supra*, p. 3). A bill of lading so signed binds the shipowner (*Tillmanns & Co.* v. *SS. Knutsford, Ltd.*, 1908, 2 K. B. 385, 394, 406, aff'd 1908 App. Cas. 406).

On the basis of its erroneous statement regarding the bills of lading, the petitioner suggests that the case raises fundamental questions of law as to the status of a time-charterer. It is respectfully submitted that no such question arises. The legal situation was a perfectly familiar one. The charter party, as between the shipowner and the charterer, was a private contract of carriage. If the charterer chose, as it had the right to do, to put the ship on the berth—in other words to offer her to the public—then the ship and her owners became common carriers *as between themselves and those cargo owners* whose cargo had been loaded on the ship and was covered by her issued bills of lading. The bills of lading in the present case were signed by the charterer as agents on behalf of the master, as the Circuit Court of Appeals correctly found (R., p. 484). This is, and for many years has been, one of the most usual arrangements for carriage. It involves no novelty whatever.

Such a bill of lading, when issued, of course creates rights and obligations as between the cargo owner and the shipowner. For example, the cargo owner can sue on it in his own name for damage to cargo. The shipowner can hold the cargo and its owner for freight (if not prepaid), for contribution to general average expenses, etc. These rights and obligations are defined in the Carriage of Goods by Sea Act.

Even if the petitioner were also to be regarded as a carrier (cf. *The Themis*, 275 Fed. 254, 262, 263 (C. C. A. 2), it would make no difference, for the "carrier," whether owner, time charterer, or both, was under no obligation to transship the cargo, because of the provisions of the bills of lading and of the Carriage of Goods by Sea Act. The petitioner's expenditures were entirely voluntary.

4. The petition throughout begs the question. It asserts again and again that the shipowner violated its contract and therefore must make good to the petitioner the expenses of transshipment, but it nowhere demonstrates that the petitioner was under any obligation to incur the expenses of transshipment. This fallacy runs throughout the petitioner's argument.

Again, at the top of page 11 of the petition, the assumption is made that it was "legally required" by the charter party that the cargo be transshipped at the shipowner's expense. There was no such requirement. On the contrary, paragraph 15 of the charter provided that, in case of such an accident, the ship should go off hire until repaired (pp. 1, 2, *supra*). A similar fallacy appears at page 16 of the petition, where the Circuit Court of Appeals is asserted to have held that the petitioner should recover "its expenses resulting from respondents' breach of contract * * * from the innocent cargo owners." The expenses in question did not result from any breach of respondents' contract, but from the petitioner's voluntary act; nor did the Court below hold or suggest that the petitioner had any right of recovery from the cargo owners.

5. It is suggested by petitioner that the Circuit Court of Appeals adopted two inconsistent theories. That is not the fact. The Court held (1) that the petitioner was under no liability as to cargo in respect of the accident; therefore, if it undertook expenses which it was not bound to incur, it was to that extent a volunteer; and (2) that, as recognized by the petitioner's letter (Exhibit 41) and by the assignments (Exhibit 42), under the bills of lading the petitioner was under no obligation to pay transshipment expenses. There is no inconsistency here; on the contrary, both propositions are correct.

6. The petition further assumes that it was the duty of the respondents to provide another ship when this acci-

dent occurred. No arguments are presented in support of this proposition, it was not asserted in the Courts below, and it is clearly unsound. Under the provisions of the time charter (par. 15), petitioner was entitled only to a return of charter hire paid in advance and unearned at the time of the breakdown. This measure of compensation was allowed below and petitioner is not entitled to any additional amount.

A time charterer has no property right in the ship. He has only a contract with the owner (*Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303). It is obviously appropriate therefore that his damages, in the event of loss of use of the vessel from accident, should be measured by the charter hire, as the contract provides. Clause 15 says that, "in the event of the loss of time from * * * breakdown or damages to * * * machinery", hire "shall cease for the time thereby lost." It does not give the charterer the option of deducting hire *or* of claiming damages, still less the right to do both. Its provisions are exclusive with respect to all cases where the use of the vessel is lost. In it the parties have enumerated a category of casualties not unlikely to occur, and have themselves provided what the effect of such casualties shall be. For loss of time due to breakdown, they have provided that hire shall cease. This is fair to both parties for, when the charter is made, it cannot be foretold whether such a provision will be to the advantage of the owner or of the charterer.

In *Clyde Com. SS. Co.* v. *West India SS. Co.*, 169 Fed. 275, the Circuit Court of Appeals for the Second Circuit analyzed a similar charter party and concluded that the breakdown clause

> "must be understood to state absolute categories in which the parties intended the hire to be suspended whether the owner was at fault or not. * * *" (p. 278).

In the *Ask*, 156 Fed. 678, 681, where the ship was about to load a cargo of bananas and became unseaworthy because of the partial collapse of her furnaces, Judge Hough said:

> "* * * For such contingencies the charter party provides a stipulated measure of damage—i.e., loss of charter hire—and no other measure is permissible, unless a covenant could be found in the contract obliging the vessel to transport the last cargo of the season from Nipe Bay, and no other. It is too plain for argument that no such contract was made."

In *Aktieselskabet Stavangeren* v. *Hubbard-Zemurray SS. Co.*, 250 Fed. 67, the time chartered vessel, having loaded a cargo, was disabled by breakage of her rudder. The Circuit Court of Appeals for the Fifth Circuit held that the breakdown clause, which was similar to that in the present charter, made

> "the cessation of hire, until the vessel is again in efficient state to resume her service, the agreed compensation the charterer was to be entitled to for a loss of time so occasioned" (p. 69).

In the *Bjornefjord*, C. C. A. 2, 271 Fed. 682, Judge Learned Hand in the District Court stated that the breakdown clause "completely defined the charterer's remedy, viz., to be relieved from payment of hire 'until the steamer was again in an efficient state to resume her service.'" The Circuit Court of Appeals affirmed, though without considering this question.

Accordingly, the Circuit Court of Appeals here correctly held that, in receiving back the hire which had been prepaid for the period of breakdown, the petitioner received all the damages to which it was entitled.

7. The petitioner refers to the case of the *Caledonia*, 157 U. S. 124, and to similar decisions. Of course both the Courts below recognized the *Caledonia* as authoritative, subject to the provisions of the Carriage of Goods by Sea

Act and of the charter party. This Court has frequently stated that the parties may exclude the rule of the *Caledonia* by contract,* and the District Court thought that the special terms of paragraph 16 of the charter party ("accidents of * * * machinery * * * *throughout this charter party always* mutually excepted") were such as to make the rule of the *Caledonia* inapplicable. This construction seems confirmed by paragraph 19, under which the shipowner would be entitled to contribution in general average for any sacrifices incurred in consequence of such an accident as the present. It would obviously be absurd to hold the shipowner liable in damages for such an accident and, at the same time, to let him recover back in general average. This, however, was only one of the grounds of the District Court's decision. The Circuit Court of Appeals considered it unnecessary to pass upon this question (p. 483), and based its decision upon other grounds.

8. The petition cites *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312, and the *City of Norwich*, 118 U. S. 468. The former case held that an insurer against cargo damage, upon paying the loss, was subrogated to the rights of the insured, and might sue the carrier; but that, where the contract of carriage contained a benefit of insurance clause, the insurer was bound by it, since he stood in the shoes of the insured. In the latter case, where a vessel sank from collision, she was afterwards raised and libelled for cargo damage, and it was held that the shipowner might limit liability as of the termination of the voyage and that hull insurance payable to the shipowner was no part of his interest in the ship or freight, within the meaning of the limitation law. It is not perceived that either of these decisions has the remotest bearing upon the case at bar.

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* *The Edwin I. Morrison*, 153 U. S. 199, at 210, quoted in *The Caledonia*, 157 U. S., at 130; *The Carib Prince*, 170 U. S. 655, at 659; *The Southwark*, 191 U. S. 1, at 6; *The Irrawaddy*, 171 U. S. 187, at 190; *Work* v. *Leathers*, 97 U. S. 379, at 380.

III

Conclusion.

The decision of the Circuit Court of Appeals was correct and no question of general importance, such as to warrant a writ of certiorari, is involved in the case.

The petition should be denied.

New York, N. Y., November 10, 1941.

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FILED
NOV 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 721.

ISBRANDTSEN-MOLLER COMPANY, INC.,
Petitioner,

—against—

Motorship "TOLEDO" and WILH. WILHELMSEN, et als., Owners,
Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JAMES W. RYAN,
Counsel for Petitioner.

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I. The "further statement of facts" and arguments in respondents' brief with respect to the decision on the second cause of action are wholly irrelevant because that cause of action was brought in "tort" by petitioner "as assignee" of third party cargo owners' rights, and the petitioner does not seek to review it because it involved no contractual express promise by respondents that a seaworthy ship would be delivered 1

II. The facts as found by the Circuit Court of Appeals with respect to the first cause of action in the libel are undisputed. That cause of action was brought in "contract" by petitioner as charterer for breach of respondents' express promise in the charter party that they would deliver a seaworthy ship, and the petition seeks a review of the decision on that first cause of action because of its conflict with the decisions of this Court relied on in the petition.

The fundamental question raised by the petition is the correctness of the Circuit Court of Appeals' decision that a person who has been promised a seaworthy ship is not entitled to one, and must accept and use a seriously unseaworthy ship which has been tendered him, because if he does not do so he will by legal fiction be regarded as a "volunteer" and be precluded by the Federal Courts from recovering any increased expense necessarily incurred in hiring a seaworthy ship from another shipowner as a substitute to perform the contractual service which the original shipowner promised but failed to perform.

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The new rule announced by the Circuit Court of Appeals in this case is of great importance to the public and to American shipping interests because of its radical impairment of the fundamental obligation to deliver a seaworthy ship when an express promise to make such delivery has admittedly been made by written contract. The decision is plainly in conflict with the decisions of this Court in *The Caledonia*, 157 U. S. 124, and other cases relied on in the petition.... 3

III. Charter party clause 15, the "off-hire clause", is not the measure of damages when there has been an admitted major breach at the outset in tendering an unseaworthy ship for the service, and when, as both Courts below have found, the ship was at all times unfit for the service contracted for 6

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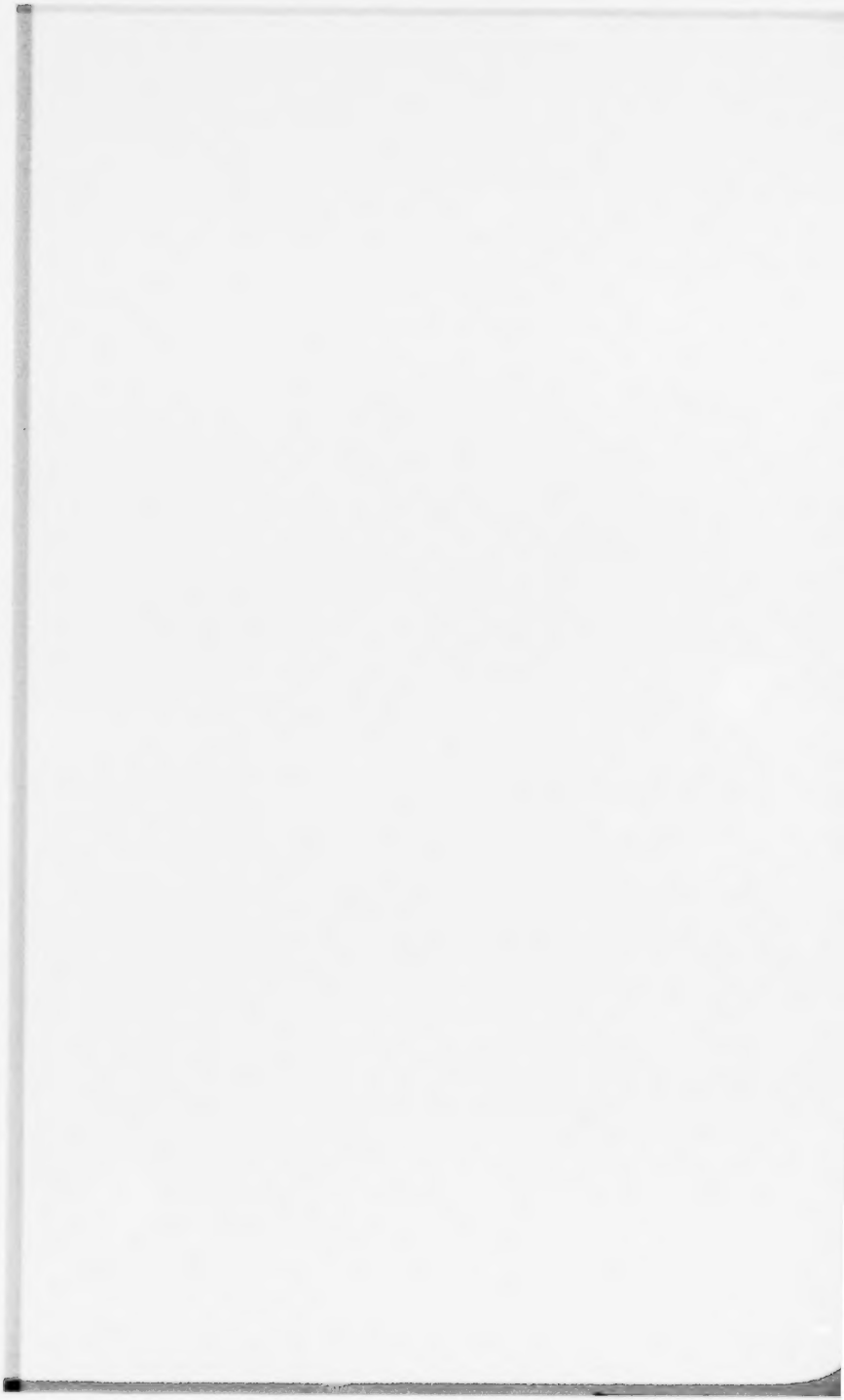

IN THE

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OCTOBER TERM, 1941.

No. 721.

ISBRANDTSEN-MOLLER COMPANY, INC.,
Petitioner,

—against—

Motorship "TOLEDO" and WILH. WILHELMSEN,
et als., Owners,
Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The Toledo, 122 Fed. (2d) 255 (C. C. A. 2); R., p. 481;

The Toledo, 30 F. Suppl. 93 (E. D. N. Y.); R., p. 424.

Jurisdiction.

Jurisdiction is provided by 28 U. S. C., Sec. 347(a).

I.

The petition seeks a review of the decision of the Circuit Court of Appeals with respect to the personal liability of respondents on the first cause of action in the libel based solely on the charter party, and brought by petitioner as charterer for breach of

respondents' express promise to deliver a seaworthy ship. The "further statement of facts" on pages 2 to 6 of respondents' brief is therefore irrelevant and misleading because it relates to the decision of the District Court with respect to the *in rem* liability of the ship on the second cause of action in the libel which was brought by petitioner as bailee and assignee of cargo for "tort and cargo damage" (R., p. 22) and which, as it involved no express promise of seaworthiness, was held to be governed by the Carriage of Goods by Sea Act which exempts a shipowner, in the absence of express promise, from any duty of delivering a seaworthy ship, and limits his duty to the use of due diligence. The "further statement of facts" in respondents' brief also contains statements from that part of the District Court's opinion and grounds of decision which the Circuit Court of Appeals expressly refused to affirm. The "further statement of facts" is therefore wholly inaccurate and misleading, excepting in so far as it quotes charter party clause 15, which will be shown hereinafter to be inapplicable as a measure of damages when the promise to tender a seaworthy ship for loading has been breached. Both Courts below have held that neither the Carriage of Goods by Sea Act nor the petitioner's bills of lading to third parties incorporating that Act has any bearing on the first cause of action in the libel, which is based solely on the charter party entered into directly by respondents with petitioner. (See especially the last paragraph in the opinion of the Circuit Court of Appeals at p. 485 of the Record, and in 122 F. 2d at p. 257. See also the District Court's statements at pp. 191 and 192 of the Record, quoted at p. 24 of the Petition for Certiorari, and the District Court's opinion at R., pp. 429-434 and 426-427, hereinafter quoted.)

II.

The facts of this case as found by the Circuit Court of Appeals, with respect to the first cause of action in the libel, are very simple and beyond dispute: The respondent shipowners promised to deliver a seaworthy ship to petitioner on December 15, 1938. They did not do so, and the petitioner hired a seaworthy ship from another shipowner to perform the service that the respondents had contracted to perform. The excess expense or hire incurred by the petitioner in doing so, over the hire on a monthly basis originally agreed upon with respondents, is sought to be recovered by petitioner in the first cause of action in the libel. On these facts the Circuit Court of Appeals, instead of stopping at that point and awarding petitioner its damages, concluded erroneously as matter of law that petitioner was not entitled to recover this expense, not because it did not incur it (since the uncontradicted evidence shows that it did incur it, R., p. 289), but because, on the expectation that it was going to receive a seaworthy ship from respondents in accordance with the contract, the petitioner had independently entered into contracts with some third persons under which it agreed that it would carry their goods, and as these third persons had not incurred any expense or sustained any damages because petitioner had itself borne the expense of hiring another ship and had thus not breached its contracts with them, therefore [*sic*] petitioner was not entitled to recover its own damages from respondents for the admitted breach of the charter party sued on. Although the Circuit Court of Appeals recognized in the last paragraph of its opinion (R., p. 485) that these independent contracts or petitioner's bills of

lading with third parties and the Carriage of Goods by Sea Act had nothing to do with the case in so far as the first cause of action in the libel based on the charter party is concerned, and that those contracts with third persons were not properly admissible in evidence at all over the objections which petitioner made, it erroneously and inconsistently concluded that the petitioner, on the first cause of action, could not recover from respondents the excess expense of hiring a substitute ship which it had itself incurred, but could recover only an indemnity for supposed damages the third parties might sustain from a breach by petitioner of its contracts with them. On the Circuit Court of Appeals' decision, a person who has been promised a seaworthy ship is not entitled to get it, or on failure to get it, to hire a seaworthy ship from another shipowner at any necessary increased expense to perform the service. If he does so he is a "volunteer". He must use the unseaworthy ship that is offered him. His only chance to recover anything is to go out and find some third persons and promise to deliver them a seaworthy ship, and then not deliver a seaworthy ship or arrange for a seaworthy ship as a substitute, so that he will be himself a defaulter if the shipowner breaches the independent contract with him by delivering him an unseaworthy ship, and thus be enabled as a defaulter to sue for an "indemnity" for damages for which he is liable to the third persons. This new and almost fantastic rule announced by the Circuit Court of Appeals obviously puts a premium on, and encourages, the delivery by shipowners of their ships in unseaworthy condition, notwithstanding their contracts call for delivery in seaworthy condition. The decision of the Circuit Court of Appeals is plainly in conflict with the rule announced by this

Court in *The Caledonia*, 157 U. S. 124, because it exempts an admitted violator of that rule from any liability for damages excepting under arbitrarily-restricted and practically-rare and extraneous circumstances. The Circuit Court of Appeals evidently overlooked the fact that, under the rule in *The Caledonia*, 157 U. S. 124, the petitioner would have been entitled to its damages, *i. e.*, the excess expense sued for of hiring the substitute ship, even if it had not entered into the independent contracts with the third persons. The purpose for which petitioner should use the ship after her delivery by respondents as promised in seaworthy condition, whether or not under contracts that might be entered into between petitioner and third persons, was simply of no concern to the respondents. The respondents' duty under their contract was to deliver to petitioner a seaworthy ship on December 15, 1938, and when they failed to do so they became liable for the excess expense the petitioner incurred in hiring a seaworthy ship from another shipowner as a substitute to perform the respondents' contractual duty. They could not properly escape liability for a breach by insisting that the petitioner accept and use the unseaworthy ship instead of getting a seaworthy one. The Circuit Court of Appeals plainly erred in holding that the respondents could escape liability for their breach of promise of unseaworthiness to petitioner by insisting that their unseaworthy ship be used. Such insistence was unreasonable and was in direct violation by respondents of their contract with petitioner. The rule announced in *The Caledonia*, 157 U. S. 124, is that a shipowner who has promised to deliver a seaworthy ship must deliver a ship which is in fact seaworthy. The decision of the Circuit Court of Appeals in the present case is that although the respondents had promised to deliver to petitioner a

seaworthy ship, the petitioner was required to accept and use an unseaworthy ship, or else be a "volunteer" and not be entitled to recover any expense necessary in getting a seaworthy ship from somebody else as a substitute for the service the respondents had contracted to perform. Chief Justice Taft, then Circuit Judge, writing for the Circuit Court of Appeals for the Sixth Circuit, in *The Oregon*, 55 Fed. 666, 673, said:

> "But it is a general rule that it is the duty of one party to a contract which has been broken by the other to use reasonable diligence to reduce the damages arising from the breach. If, therefore, in cases of freight contracts, the carrier refuses to perform, it is the duty of the shipper, if he can reasonably expect thereby to reduce his loss, to seek other means of transportation, and perform the contract himself."

The Circuit Court of Appeals in the present case announces an exactly opposite rule from that announced by Chief Justice Taft, and still in effect, in the Sixth Circuit. The Sixth Circuit rule was approved and followed in *The Capitaine Faure*, 10 Fed. 2nd at page 969.

III.

Clause 15 of the charter party (the "off-hire" clause), quoted in respondents' brief at page 1, and relied on at pages 10, 11 and 12, was obviously not intended as a measure of the damages in case of a breach by the shipowners by failing to deliver a seaworthy ship. When, as here, a vehicle with driver or crew is hired on a private carrier basis (*i. e.*, to carry a full cargo for a single shipper) at a monthly rate of

hire for a trip to an agreed distant city with "any lawful goods" the hirer chooses to ship himself or to contract as a common carrier to carry for third persons, and the owners represent that the vehicle is in good condition and further make an express promise and a warranty in writing, for an agreed consideration, that the vehicle will be delivered or tendered for loading on an agreed date (December 15, 1938) in good condition, and after the goods are partly loaded it is discovered that the vehicle is in bad condition and has been unfit for the trip since before the contract was entered into, and cannot be made fit until long after the trip would be completed by a good vehicle, and the expense at the time the vehicle's unfitness is discovered of hiring another vehicle which is in good condition to act as a substitute for the trip exceeds the hire originally agreed upon, the measure of damages for which the defaulting vehicle owners are liable is of course this excess hire or expense, and that is what is sued for in the first cause of action in the libel in this case. The Circuit Court of Appeals' decision that on those facts the vehicle owners are liable for no damages at all merely because the hirer, in addition to paying the hire for the substitute vehicle, does not also, under charter party clause 15, have to continue paying hire for the unfit vehicle after its unfitness has resulted in a "breakdown" before the goods are completely loaded, is supported by no decision of any Court in any reported case and is, we respectfully submit, unconscionable and in direct conflict with this Court's decision in *The Caledonia*, 157 U. S. 124. In that case this Court held that such clauses as clauses 15 and 16 in this charter party excepting accidents, breakdowns or other perils do not cover a breakdown or state of complete unfitness resulting, without intervening cause or event, solely from pre-existing unfit-

ness of the vehicle at time of tender for loading. The Circuit Court of Appeals' decision that the *Caledonia* rule applies to clause 16 but not to the similar clause 15 in this charter party is unsound and illogical and deprives the rule in *The Caledonia* (157 U. S. 124) of all practical effect in so far as this well known and widely-used New York Produce Exchange-Government Time Form of charter party expressly promising seaworthiness is concerned. It has been estimated that more than ninety per cent. of the time charter parties executed in this country are executed on this Produce Exchange form. The District Court in its opinion said: "The charter party in question is on the form which has been largely used" (R., p. 428).

The quotations at pages 11 and 12 of respondents' brief from the cases of *The Ask*, 156 Fed. 678; *Aktieselskabet* v. *Hubbard-Zemurray S. S. Co.*, 250 Fed. 67; *Clyde* v. *West India S. S. Co.*, 169 Fed. 275; and *The Bjornefjord*, 271 Fed. 682, are seriously misleading because the Court's attention is not called to the fact that in every one of those cases the vessel was seaworthy on delivery to the charterer and that no question of breach of the warranty of seaworthiness was involved. Those cases decided merely that if a shipowner has complied with his warranty and promise by delivering a seaworthy vessel to the charterer, then under the maintenance clause he need merely use reasonable diligence to maintain her thereafter in seaworthy condition. It is elementary that the duty under a maintenance clause is not a warranty, and is different both in nature and extent from the warranty of seaworthiness applicable at the outset of the service. In the quotations given in respondents' brief the Courts were referring only to the duty under the maintenance clause.

IV.

The Courts below found concurrently that the contract which the respondents entered into was not a contract of common carriage but one of private carriage, *i. e.*, it was a contract for the hire of a vessel with crew, at a monthly rate of hire, for use by a single shipper, the petitioner, in the carriage of a full cargo, the Captain, although appointed by the owners, being at all times (under charterparty clause 8; R., p. 25) "under the orders and directions of the charterers as regards employment or agency", and being required "to sign Bills of Lading for cargo as presented" by charterers. The respondent shipowners therefore had no contractual rights or personal liability with respect to the petitioner's bills of lading or the freight charges which the petitioner might agree on and collect from the third party owners of the various small shipments. The Courts below further found concurrently that the respondents' contract of private carriage was entered into only with petitioner and consisted of the charterparty sued on in the first cause of action in the libel. These findings constitute a direct holding that the respondents were not parties to the contracts of common carriage or bills of lading which the petitioner entered into with the third party cargo owners. Indeed the Circuit Court of Appeals stated that the respondents had taken the position in both Courts below that they were not parties to any contract excepting the private carrier contract with petitioner consisting of the charterparty sued on in the first cause of action. It said (122 F. 2d at pp. 256-257):

> "The appellees attempt to distinguish these cases on the ground taken by the district judge,

> namely, that there the warranty of seaworthiness was made by a common carrier while here it is the promise of a private carrier. * * * The principles of construction discussed in *The Caledonia, supra*, would seem to be equally applicable when the warrantor is a private carrier."

And the District Court in its opinion said (R., pp. 426-427):

> "The charter party was, however, a private contract and not a contract of common carriage, and the relations between the owner and the charterer are not altered if the charterer chooses to put the ship on the berth and offer her to shippers as a common carrier."

The contention at pages 8 and 9 of respondents' brief that the respondents were parties to petitioner's contracts of common carriage or bills of lading with the third party cargo owners, and are consequently entitled to rely on the clauses in them incorporating the Carriage of Goods by Sea Act, the latent defect exception and transshipment clause, quoted extensively as a "further statement of facts" from the District Court's opinion on pages 2 to 6 of respondents' brief, is therefore an attack by respondents on the concurrent findings of the Courts below. The charter party sued on incorporates by special provision (Clause 24, Charter Party; R., p. 25) the Harter Act, which is inconsistent with the Carriage of Goods by Sea Act, and the Harter Act contains no exception of latent defect. Moreover, the pre-existing unseaworthiness at time of loading would under the rule in *The Caledonia*, 157 U. S. 124, preclude reliance on any exception of accident, breakdown, or latent defect. The Circuit Court of Appeals has expressly held that,

with respect to the first cause of action in the libel based on the charter party, the respondents are not entitled to rely on latent defect or accident, and are not entitled to rely on the Carriage of Goods by Sea Act or on any of the clauses in petitioner's common carrier contracts or bills of lading issued to third persons (122 Fed. 2nd at p. 257; R., p. 485). The attack by respondents themselves on the Circuit Court of Appeals' decision confirms the statement in the petition that that decision is unsound and irreconcilable with this Court's decision in *The Caledonia*, 157 U. S. 124, and announces a new rule which is creating confusion in the meaning of hitherto-clear and widely-used commercial contracts containing express promises that vessels when tendered for loading will be in fact seaworthy. The error of the Circuit Court of Appeals consisted in the fact that, after holding that the respondents had contracted as private carriers and that they had breached this contract by failing to deliver to petitioner a seaworthy ship, the Court concluded illogically that the petitioner could not recover the damages or excess expense which the uncontradicted evidence shows it personally sustained as a result of the breach, but could only recover an indemnity consisting of supposed damages sustained by third party cargo owners from supposed breach by petitioner of its independent contracts with those third parties. This conclusion is obviously inconsistent with the Court's holding that the respondents were not parties to petitioner's common carrier contracts with the third persons. In the first cause of action in the libel, the petitioner is seeking in clear language (R., pp. 20 and 1; and Petition, p. 23) the recovery of the damages or excess expense it itself sustained as a result of the breach, and not those sustained by third parties.

The statement on page 9 of respondents' brief that "these rights and obligations are defined in the Carriage of Goods by Sea Act" is incorrect and irrelevant because the Courts below have found concurrently that the Carriage of Goods by Sea Act is inapplicable to the first cause of action in the libel based on the charter party, and indeed the charter party expressly incorporates by clause 24 (R., p. 25, Libellant's Exhibit 15, paragraph 24) the Harter Act which is inconsistent with the Carriage of Goods by Sea Act.

The statement at pages 10 and 11 of respondents' brief that "it was not asserted in the Courts below" by petitioner that "it was the duty of the respondents to provide another ship when this accident occurred", is wholly incorrect. Aside from the numerous times it was asserted orally and in petitioner's briefs in both courts below, the Record shows that the assertion was made by petitioner in Assignments of Error Nos. 2 and 3 (R., p. 458), Nos. 12 and 13 (R., p. 460), No. 15 (R., p. 461), No. 27 (R., p. 464), No. 36 (R., p. 465), No. 37 (R., p. 466), and No. 43 (R., p. 467), and all of those assignments were pressed and argued by petitioner in the Circuit Court of Appeals. Also the Circuit Court of Appeals states in its opinion that "On the 24th the charterer suggested transshipment of the cargo but the captain did not accede to the suggestion" (122 Fed. 2nd at p. 256; R., p. 482). The respondents declined to deliver a substitute seaworthy vessel because of their mistaken belief that, as their counsel argued in both Courts below, they had a "right" under the law to escape any actual financial liability for their breach of contract by insisting that petitioner accept and use an unseaworthy ship notwithstanding it had been expressly promised a seaworthy ship.

V.

The statement at page 8 of respondents' brief that in the case of *Isbrandtsen-Moller Company, Inc.* v. *U. S.*, 300 U. S. 139, "the opinion does not discuss the question of common carriage" is not correct. The only question which was discussed by this Court in that case was the validity of an order issued on November 18, 1935, by "The Secretary of Commerce, purporting to exercise the functions of the United States Shipping Board under Section 21 of the Shipping Act, 1916" and reading, so far as material, as follows:

> "*It appearing further,* That Isbrandtsen-Moller Company, Inc., *is a common carrier by water* in foreign commerce subject to the Shipping Act, 1916;
>
> *It is ordered,* In pursuance of the powers conferred by Section 21 of the Shipping Act, 1916, that Isbrandtsen-Moller Company, Inc., be, and it is hereby, notified and required to file with the Division of Regulation, United States Shipping Board Bureau, of this Department, at its office in Washington, D. C., on or before December 16, 1935, each port-to-port and trans-shipment rate charged and/or collected by it during the period from September 1, 1935, to November 12, 1935, both dates inclusive, for the transportation of property, * * *" (Record, p. 5, in *Isbrandtsen-Moller Co.* v. *U. S.*, U. S. Supreme Court, Oct. Term, 1936, Docket No. 307).

As the master of the vessel was under charter party clause 8 (R., p. 25) at all times the servant or agent of petitioner as charterer and "under the orders and direction of the Charterers as regards employment or agency" (and see also R., pp. 295-296), neither the master nor the petitioner was an agent of the respond-

ent shipowners in any sense in connection with petitioner's bills of lading or common carrier contracts, and the Courts below have found concurrently that their issuance created no contractual relations between the respondent shipowners and the third party cargo owners with whom the petitioner contracted. The contentions on pages 8 and 9 of respondents' brief are therefore wholly unwarranted.

The statement on page 9 of respondents' brief that "the shipowner can hold the cargo and its owner for freight (if not prepaid)" is wholly incorrect. Under this charter party the respondent shipowners were entitled to nothing but monthly charter hire from the petitioner, and they had no control over or interest in the freight which petitioner and the third party cargo owners agreed upon for the carriage of the goods. The petitioner alone as the charterer was entitled, either directly or through the master as its agent, to hold the cargo and its owner for freight.

The respondents nowhere in their brief mention the conflict of the decision of the Circuit Court of Appeals in this case with the decisions of this Court in *Acme Fast Freight* v. *U. S.*, 309 U. S. 638, and *U. S.* v. *Trucking Co.*, 310 U. S. 344, relied on as grounds for certiorari at pages 3, 4 and 29 of the Petition.

The contention on pages 12 and 13 of respondents' brief, in support of the part of the District Court's opinion which the Circuit Court of Appeals refused to affirm, is unsound. The fact is that the exceptions clause in the charterparty in the present case is in all substantial respects identical with that in the *Caledonia* case (157 U. S. at p. 127). The exceptions clause in the *Caledonia* case recited the various perils by name, including loss or damage from steam boilers

and machinery or defects therein, accidents, and others, and concluded with the word "excepted". The exceptions clause in the present case (Clause 16, Charterparty, Libellant's Exhibit 15, R., fol. 73) recites the various perils by name, including dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and concludes with the words "throughout this charterparty, always mutually excepted". The additional words in the clause in the present charterparty are words not of extension, but of restriction. The perils in the clause in the *Caledonia* case were excepted without limitation. In the present case they are only excepted "throughout this charterparty". It is, therefore, plain that the perils excepted in the present charterparty are only perils or intervening third causes originating or encountered either after the charterparty was entered into or after the "Toledo" should have been delivered by respondents to petitioner in seaworthy condition for service under the charterparty. On the concurrent findings of the Courts below no peril or intervening third cause originated or was encountered by the "Toledo" after this charterparty was entered into or after she was delivered to the petitioner for service under the charterparty, and everything happening to her thereafter resulted inevitably from an already unseaworthy condition.

In *Phoenix Ins. Co.* v. *Erie Co.*, 117 U. S. 312, this Court held that in the absence of a clause in the shipowner's contract giving the shipowner the benefit of a shipper's contract of indemnity obtained from third persons, the shipowner is not entitled to any benefit or indemnity the shipper may be entitled to from the third persons. The respondent shipowners' contract of charter party with petitioner in the present case contains no such clause giving respondents the benefit

of any indemnity which petitioner may be entitled to under any contracts entered into between petitioner and third persons or cargo owners. The decision of this Court in the *Phoenix Ins. Co.* case is, therefore, directly in conflict with the decision of the Circuit Court of Appeals in the present case that the respondent shipowners are entitled to the benefit of petitioner's contracts with third persons by limiting petitioner's recovery merely to such amount as the third party cargo owners may have agreed with petitioner to assume.

In *The City of Norwich*, 118 U. S. 468, this Court held that the fact that one of the parties had entered into an indemnity contract with third persons did not entitle the other party to use the terms or benefits of that indemnity contract as a means of increasing or reducing the measure of damages otherwise applicable between the parties for a breach of duty by one to the other. The Circuit Court of Appeals in the present case has held that the fact that the petitioner entered into "indemnity" contracts with third party cargo owners changes the otherwise applicable measure of petitioner's damages for respondents' breach of duty under the charter party by restricting petitioner's recovery from respondents to "a claim for indemnity" (122 F. 2d at p. 257) for "the damages which the cargo owner would have against it" (122 F. 2d at p. 257) under the indemnity contract between petitioner and the third party cargo owners.

The decision of the Circuit Court of Appeals in this case is therefore also in conflict with those decisions of this Court.

Respectfully submitted,

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